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Ira Lubell, M.D., Chair
Panel A
Division of Medical Quality

**BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Petition for Termination
of Probation of

LEE STEVEN BRILLIANT, M.D.
38 South 350 East
Logan, Utah, 84321

Physician's and Surgeon's Certificate No.:
G 33218

Petitioner.

OAH No. 1999060357

PROPOSED DECISION

On July 14, 1999, in San Diego, California, Stephen E. Hjelt, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Heidi Weisbaum, Deputy Attorney General, represented the people of the state of California.

Petitioner Lee. S. Brilliant, M.D., was present and represented himself.

Evidence was received and the record was held open for the submission by petitioner of additional documentation regarding litigation filed against him in Utah. On October 13, 1999, petitioner filed and served on the Administrative Law Judge and the Attorney General's office documents that were marked for identification as exhibit 2 and received in evidence as administrative hearsay. On October 13, 1999, the record was closed and the matter was submitted for decision.

FACTUAL FINDINGS

1. Dr. Brilliant received his undergraduate education at the University of Southern California. He received his medical degree from the University of California, Davis in 1975. He has 23 years of medical practice although he has closed his medical practice in

Utah to pursue other professional opportunities. In his narrative statement he discusses his future plans as follows:

"It is my desire to leave the clinical practice of Medicine and to pursue an administrative career. To this end, I closed my practice in 1997 to become a full time student and obtain my Masters in Business Administration. However, even an administrative position such as Chief Medical Officer or Medical Director requires a free and unrestricted license to practice medicine. Therefore, I petition the Medical Board of California to lift my probation as did the Utah Department of Occupational and Professional Licensing."

2. Petitioner was disciplined by the Medical Board of California following the filing of an Accusation in or about June 1990. In the Accusation, he was charged with violations of the Medical Practice Act, in his care and treatment of one obstetrical patient in 1987 and 1988. The factual predicate for the charges is repeated verbatim from the Accusation as follows:

"A. On or about July 9, 1987, respondent Lee S. Brilliant, M.D. assumed the obligation of providing obstetrical care to Hilda A. This was the third pregnancy for this patient.

(a) Respondent failed to perform a timely blood screen for diabetes on Hilda A. during her pregnancy.

(b) Respondent failed to institute adequate fetal surveillance when Hilda A. went past her due date.

(c) Respondent failed to maintain accurate prenatal records on Hilda A.

(d) Respondent failed to adequately follow up after an Ultrasound examination on Hilda A.

B. in the providing of Intrapartum/Labor and Delivery care...

(a) Respondent failed to properly assess the gravity of the fetal condition after Hilda A. was admitted to Granada Hills Hospital on March 9, 1988 and the fetal monitor showed ominous fetal heart rate patterns.

(b) On March 9, 1988 Respondent performed an amniotomy which revealed the presence of thick meconium. Respondent failed to properly assess the gravity of the situation and failed to intervene during Hilda A.'s labor resulting in the birth of a stillborn infant.

(c) On March 9, 1988 Respondent failed to recognize the gravity of the fetal condition and ordered Demerol causing further ominous reaction as evidenced by the fetal heart rate.

(d) Respondent failed to have a surgical team or pediatrician on standby despite the presence of (1) a post date patient (2) the presence of thick meconium, and (3) ominous fetal heart rate tracings.

(e) As a result of Respondent's failure to intervene and failure to have a surgical team on standby, the planned Cesarean Section was delayed and the child delivered vaginally in a hospital hallway, in a precipitous manner, with an umbilical cord around it's neck."

3. Petitioner resolved the charges in the Accusation by entering into a STIPULATED SETTLEMENT AND DISCIPLINARY ORDER, which became effective on January 10, 1992 after adoption by the Board. The relevant portion of the settlement document is as follows:

"8. Respondent admits the truth of each and every allegation of Accusation No. D4291, and agrees that respondent has thereby subjected his license to disciplinary action.

IT IS HEREBY ORDERED that Medical License No. G 33218 issued to Lee S. Brilliant M.D. is revoked. However, said revocation is stayed and respondent is placed on probation for 5 years on the following terms and conditions:

10. As part of probation, respondent is actually suspended from the practice of medicine for 30 days, beginning the effective date of this decision.

11. Within ninety (90) days of the effective date of this decision, and on an annual basis thereafter for the entire period of probation, respondent shall submit to the Division for its prior approval an educational program or courses related to the practice of medicine, which shall not be less than 40 hours per year for each year of probation. This program shall be in addition to the 25 hours of yearly continuing medical education requirements for re-licensure (or a total of 65 hours per year for the entire period of probation). Of the 65 required hours per year, 40 must be in the area of obstetrics and gynecology. Following the completion of each course, the Division or its designee may administer an examination to test respondent's knowledge of the course. Respondent shall provide proof of attendance for 65 hours of continuing medical education, of which 40 hours were in satisfaction of this condition and were approved in advance by the Division or its designee.

12. Within 30 days of the effective date of this decision, respondent shall take and pass an oral clinical examination, in the area of obstetrics and gynecology, to be administered by the Division or its designee. The oral examination panel shall be selected by the Division or its designees. The waiting period between repeat examinations shall be at 90 day intervals until three oral examinations have been administered to respondent. If respondent fails a 3rd oral examination, respondent agrees to wait one (1) year, from the date of the 3rd oral examination, before attempting the 4th oral exam. The Division shall pay the cost of the first examination and respondent shall pay the cost of any subsequent reexaminations.
13. Respondent shall not practice medicine until respondent has passed the required examination and has been so notified by the Division in writing.
14. Within 30 days of the effective date of this decision, respondent shall submit to the Division for its prior approval a plan of practice in which respondent's practice shall be monitored by another physician in respondent's field of practice, who shall provide periodic reports to the Division.
15. If the monitor quits, or is no longer available, within fifteen (15) days of such event, respondent shall submit to the Division or its designee for its approval, the name of a new monitor to comply with the terms of this paragraph.
16. Respondent shall obey all federal, state, and local laws, and all rules governing the practice of medicine in California.
17. Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Division, stating whether there has been compliance with all the conditions of probation.
18. Respondent shall comply with the Division's probation surveillance program.
19. Respondent shall appear in person for interviews with the Division's medical consultant upon request at various intervals and with reasonable notice.
20. The period of probation shall not run during the time respondent is residing or practicing outside the jurisdiction of California. If, during probation, respondent moves out of the jurisdiction of California to reside or practice elsewhere, respondent is required to immediately notify the Division in writing of the date of departure, and the date of return, if any.

21. Upon successful completion of probation, respondent's certificate will be fully restored.

22. If respondent violates probation in any respect, the Division, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an accusation or petition to revoke probation is filed against respondent during probation, the Division shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final."

4. Petitioner complied with certain terms of his California probation. However, within less than a year of the commencement of his probation, petitioner moved to Utah where he was also licensed to practice medicine. Utah proceeded against his Utah license on the basis of the discipline imposed on his California license by the MBC. In a document entitled STIPULATION AND ORDER, Dr. Brilliant entered into an agreement with the Utah Board in which he acknowledged the then status of his California probation as follows:

"...

"c. On September 9, 1991, Respondent entered into a Stipulated Settlement and Disciplinary Order ("California Order"). Respondent admitted the truth of each and every allegation of Accusation No. D-4291. The Disciplinary Order revoked Respondent's license to practice medicine in the state of California, but stayed the revocation in favor of five years of probation, the terms of which included 30 days of suspension from the practice of medicine.

d. Respondent affirms that the following [California] probationary terms have been satisfied:

1. Thirty day suspension from the practice of medicine in the State of California;

ii. Continuing education requirements through February 1992 (Forty hours of approved continuing medical education in the area of obstetrics and gynecology are required during each year of probation. These hours are in addition to the 25 hours of continuing medical education routinely required for renewal of licensure in California.);

iii. Passage of an oral clinical examination in the area of obstetrics and gynecology administered by the Division of Medical Quality, Medical Board of California or its designee before resuming his practice of medicine in the State of California following the 30 days suspension from the practice of medicine in

California (Respondent sat for and passed the required examination on February 3, 1992.);

iii. Submittal, within 30 days of the effective date of the California Order, a practice plan which requires Respondent's practice of medicine to be monitored by another physician (Respondent's practice plan was approved by the Division of Medical Quality, Medical Board of California on March 2, 1992. His monitoring physician is Dr. Adolph Campos.);

iv. compliance with all federal, state, and local laws, and all rules governing the practice of medicine in California since the issuance of the California Order;
and

v. submittal of quarterly declarations under penalty of perjury on forms provided by the Division of Medical Quality, Medical Board of California, affirming compliance with all conditions of probation through March 1992.

e. Respondent affirms that the following probationary terms have not been satisfied:

i. ongoing continuing education requirements from February 1992 forward; and

ii. monitored practice through an approved practice plan.

f. The State of Utah has a parallel interest in protecting its public and ensuring the Respondent's ability safely to engage in the practice of medicine, particularly because Respondent has moved to the State of Utah and is presently engaged in the practice of medicine here.

g. The disciplinary action taken against Respondent's license to practice medicine in California also constitutes unprofessional conduct in Utah, as defined in Utah Administrative Rule ...156-12c-8(8).

8. Respondent agrees as follows:

a. The California Order is adopted by Utah. Specifically, Respondent's license to practice medicine in Utah will be placed on probation, effective on the date of the order issued herein and continuing for a period of four years and two months. The probationary terms and conditions shall be the same as the California Order except as otherwise specified herein. In particular:

- i. Respondent will continue to obtain 40 hours of continuing medical education in the area of obstetrics and gynecology during each year of probation.
- ii. Respondent will submit or cause to be submitted to DOPL copies of all reports or documentary information prepared in conjunction with the execution of the Utah Order, the California Order, and any other information reasonably requested by the Utah Board or DOPL.
- iii. Within 30 days after the issuance of the Order in this case, Respondent shall submit to DOPL a copy of his California practice plan and a proposed practice plan to be utilized in the state of Utah for approval by DOPL in collaboration with the Utah Board.
- iv. Respondent's practice plan shall provide for monitoring of Respondent's practice by another independent physician in Respondent's field of practice who shall provide periodic reports to DOPL.
- v. Respondent will promptly meet with DOPL and/or the Utah Board upon request to discuss the content of his proposed practice plan and will meet with the Utah Board quarterly thereafter or as otherwise requested by the Utah Board.
- vi. If Respondent fails to negotiate an approved practice plan to be utilized in the State of Utah within 90 days of the date of the Order in this case, Respondent will immediately suspend his practice of medicine until a practice plan is approved.
- vii. Respondent will comply with each and every term of the approved practice plan.
- viii. The period of probation shall not run during the time Respondent is residing or practicing outside the jurisdiction of Utah unless such practice is in the State of California pursuant to a continuation of the terms of the stayed California probation. If, during probation, Respondent moves out of the jurisdiction of Utah to reside or practice elsewhere, Respondent is required to immediately notify DOPL in writing of the date of departure, and the date of return, if any

ix. Upon successful completion of probation, respondent's license will be fully restored.

x. If Respondent violates probation in any respect, Respondent agrees that following an opportunity to challenge the violation in an informal adjudicative proceeding convened in accordance with the Utah Administrative Procedures Act, if a violation of probation is established, his license to engage in the practice of medicine in Utah may be revoked for a minimum of one year.

xi. Following such a revocation, if any, Respondent would, at reasonable intervals, be allowed to petition for reinstatement of licensure, where he would be afforded the opportunity to demonstrate that he can resume the competent practice of medicine with reasonable skill and safety to patients.

xii. If a petition is filed against Respondent during probation for a violation of probation, DOPL shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

....”

5. Subsequent to entering into the Utah probation, Dr. Brilliant was the object of further charges brought against his license by the Utah Board. New charges were filed against him in or about September 1995 charging him with violation of probation as a result of the care and treatment he rendered to two obstetrics patients in 1992, 1993 and 1994 in Utah. These charges were resolved by way of a STIPULATION AND ORDER entered into by Petitioner with the Utah Board. The relevant portions of this agreement are as follows:

“7. Respondent, without admitting or denying any of the allegations contained in the Petition ... agrees that the Stipulation and Order approved by the Division on July 13, 1993, in Division Case No. OPL-93-14 may be modified.

a. Respondent agrees that the Stipulation and Order shall be modified as follows:

1. Respondent shall attend a course entitled “Mastering Medical Care: Redefining Physician Leadership” offered by the Utah Medical Insurance Association, presented by Dr. Steven Prather during 1996.

2. Respondent shall attend two (2) three (3) day seminars a year for the next two years involving high-risk pregnancies.

3. Respondent shall consult with a perinatologist at LDS Hospital or the University of Utah Medical Center for all hospital admission high-risk pregnancies prior to thirty-six (36) weeks. The term "high risk pregnancies" includes but is not limited to the following: cases involving hypertension, diabetes, multiple gestation, premature labor, preeclampsia, intrauterine growth retardation, premature rupture of membranes, or any patient admitted to the hospital prior to 37 weeks. Respondent shall document in his patient charts the recommendations made during the consultations with any perinatologist.

4. The current period of probation is scheduled to end during September 1997. The period of probation shall be extended to March 1999. Prior to September 1998, the Respondent may make a written request of the Board for termination in September 1998. The Board shall have the discretion to accept, reject or modify Respondent's request.

5. Respondent shall meet with the Board on a quarterly basis, beginning with the Board's first meeting from the date of the modified Stipulation and Order, or as determined by the Board. During his interviews with the Board, Respondent shall submit documentation that demonstrates his compliance with the above mentioned conditions.

b. All other terms of the July 13, 1993, Stipulation and Order except as specifically modified above shall remain unchanged.

c. If Respondent successfully completes the terms and conditions of the Stipulation and Order, the Division shall immediately thereafter lift any restrictions on his licenses. If, on the other hand Respondent hereafter violates any of the terms and conditions of this Stipulation and Order in any respect, or violates any state or federal laws, rules, or regulations concerning controlled substances or the practice of medicine, a hearing shall be conducted in a timely manner before the Board to determine whether further sanctions against Respondent's licenses are appropriate.

d. In the event that Respondent leaves Utah to reside or practice in another state, Respondent shall notify the Board, in writing, of his intention to do so, including the expected dates of departure and return. Such notice shall be provided no later than 14 days prior to Respondent's departure. any such periods of residency outside of Utah shall not be applied to the reduction of the terms and conditions of this

Stipulation and Order, unless Respondent sufficiently establishes, to the Board's satisfaction, continued compliance with the terms and conditions of this Stipulation and Order. The licensing authorities the jurisdiction to which respondent moves shall be notified by Respondent of this Stipulation and Order within 7 days of Respondent's arrival."

6. On December 8, 1998, Dr. Brilliant was released from his Utah probation and his Utah license was fully restored. In his petition to the MBC, he asks, in effect, to be given credit for "time served" while on probation to the Utah Division of Occupational and Professional Licensing.

7. The Attorney General argues that this Petition cannot be granted under any circumstances because of Paragraph 20 of his original stipulation and Business and Professions Code section 2307. Arguably, paragraph 20 deems that probation is tolled while a petitioner is out of state. Dr. Brilliant left California after completing only one year of probation here. Therefore, it is argued, he fails to satisfy that portion of section 2307 that reads, in relevant part:

"A person whose certificate has been revoked or suspended or who has been placed on probation may petition the Division of Medical Quality for reinstatement or modification of penalty,..., after a period of not less than the following minimum periods have elapsed from the effective date of the decision ordering that disciplinary action:

(a).....

(b) At least two years for early termination of probation of three years or more."

8. The argument made by the Attorney General, taken to its logical conclusion, is that the Medical Board of California is powerless to grant relief under any circumstances when California probation is tolled by out of state practice or residence. However, the Board's powers are not so limited. The Board does have the power to grant such a petition, but only when there is a clear, convincing and unequivocal showing of rehabilitation so that it is obvious that there is no further need for probationary oversight. The Board must be convinced that the people of the state of California will not be at risk should petitioner practice with an unrestricted license in California.

9. One of the very real practical problems is that the ability of the Board to monitor probation long distance is seriously compromised. Furthermore, the Board cannot simply assume that the probationary oversight in another state is equivalent to that in California. It is a very rare case in which the Board could safely conclude that all the salutary

goals of probation have been met by the completion of probation in another state. This case does not represent that rare situation.

10. Dr. Brilliant has taken steps to clear his license and has succeeded in this endeavor in Utah. However, the Board has criteria by which rehabilitative effort should be evaluated. One of those questions relates to whether petitioner has been involved in the same or similar problematic events since his California probation commenced. Dr. Brilliant has been involved in three separate malpractice lawsuits since he left California. His narrative states that, against his wishes, two were settled for small amounts by his insurer and the third is still pending but that there has been a pre-litigation finding of non-culpability. To support this, Dr. Brilliant supplied documentation on October 13, 1999 by fax from the Division of Occupational and Professional Licensing (DOPL), State of Utah. The document is entitled Notification of Panel Opinion and this document purports to find that Dr. Brilliant did not breach the standard of care.

11. The DOPL form highlights the added difficulties that California has in trying to determine whether probation has been successfully completed in another state. It appears from this form that Utah's disciplinary scheme is not analogous to California's. We do not have such a procedure here. It may well be true that this claim is an unworthy one and that Dr. Brilliant should not have to answer in California for this. Unfortunately, this cannot be safely concluded on the basis of the record.

12. Dr. Brilliant is to be commended for his efforts to increase his knowledge base as a physician. However, it cannot be safely assumed that these efforts are satisfactory for the purpose of terminating his California probation.

LEGAL CONCLUSIONS

1. Good cause was not established to grant the Petition for Termination of Probation filed by Dr. Brilliant by virtue of Factual Findings 1-12.

ORDER

The Petition for Termination of Probation filed by Lee Brilliant M.D. is denied.

DATED: 11-22-99


STEPHEN HJELT

Administrative Law Judge
Office of Administrative Hearings